SUPREME COURT, U. S.

IN THE

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OCTOBER TERM, 1973

No. 73-661

JOSEPHINE GOSS, *et al.*,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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The Brief of Respondents [in opposition to certiorari] fails to address the legal issues presented in the Petition, but rather seeks to portray this case as one involving only a factual question which was properly resolved below. That characterization is inaccurate and misleading.

This Court's review is essential to eliminate the existing and potential conflicts among the Courts of Appeals created by the Sixth Circuit's decision in this case, and to give meaning to the Fourteenth Amendment requirement that a unitary school system be established in Knoxville. More than fifteen years after the commencement of litigation to desegregate the Knoxville schools, and more than a decade after this Court's rejection of the city's racially based transfer plan, *Goss* v. *Board of Educ.*, 373 U.S. 683 (1963), 59% of all black children in this predominantly white system attend heavily black schools.

Finally, it is imperative that this Court review this matter to give badly needed guidance and direction to the Court of Appeals for the Sixth Circuit. The *en banc* rehearings in this case and in *Mapp* v. *Board of Educ. of Chattanooga,* 477 F.2d 851 (6th Cir.), cert. denied, 42 U.S.L.W. 3290 (November 12, 1973), have failed to resolve any of the numerous conflicts among panels of the Circuit on the question of school desegregation. District courts within the Circuit have been left without counsel for guidelines, as is readily reflected in the status of school desegregation in the various Tennessee city school systems.

I

As we pointed out in the Petition (pp. 8-10), the district court determined to deny the further relief sought by plaintiffs based upon its erroneous legal conclusions that (1) 99%-black schools are sufficiently integrated [340 F. Supp., at 717; 13a]; (2) plaintiffs' demand for further relief amounted to an attempt to achieve "racial balance" [340 F. Supp., at 727-28; 23a-24a]; and (3) Knoxville's adoption of reasonable "neighborhood school" zones (in place of the dual overlapping attendance boundaries it maintained prior to 1964-65) satisfied the school board's constitutional obligation to convert from a dual to a unitary school system, whatever the resulting student enrollment patterns [340 F. Supp., at 718, 729; 14a, 25a].

The Court of Appeals adopted or approved these legal declarations in its affirmance. Though not so explicit as the district court in indicating the acceptability of minimally integrated facilities (see Petition, p. 9 n.16 and accompanying text), the Sixth Circuit found the continued maintenance of a "small number" of racially identifiable schools in Knoxville to be valid (3a)—in spite of the

fact that seven black schools remain and there never were more than nine black schools in the system at any time.

The Court of Appeals agreed (unlike the Fourth Circuit's perceptive holding in the *Danville* case, see Petition at p. 9) that plaintiffs sought "to obtain a certain percentage of black students in each school in the system" (4a). And the court approved Knoxville's compliance with the Fourteenth Amendment with the statement that the system "ha[d] taken [some] affirmative action to improve the racial mix of the schools" (3a).

Each of these issues is of critical significance in school desegregation cases; each has been resolved by other Courts of Appeals in a manner inconsistent with the holdings of the Court of Appeals and district court herein, and each merits review by this Court. *Cf.* Rule 19(1)(b) of this Court. Yet the respondents totally decline to support the erroneous legal rulings of the courts below. Instead, they suggest that only factual questions can be presented to this Court, because the Court of Appeals summarily dismissed claims of inconsistency with its other rulings with the statement that "the proof . . . failed to establish [the basis for the results reached in the other cases]."

The Court of Appeals did say:

> . . . the appellee presented evidence . . . from which the [district] court was justified in finding that no plan involving the transportation of pupils . . . would be feasible. . . . (3a-4a)

But as we pointed out in the Petition (p. 13), the district court never made such a determination. Although it discussed some of the geographic and demographic features of Knoxville in summarizing the evidence, it made no factual findings on the subject since the court held the

system was already "unitary" and that further desegregation attempts were efforts to achieve "racial balance." Thus it is legal doctrine and not fact finding which is placed in issue before this Court.

II

Respondents minimize the fact that even after this case received district court reconsideration in light of *Swann,* 59% of all black students in this more-than-80%-white school system were assigned to identifiably black schools (Petition, at p. 7). This is unexpected in view of their admissions that zone lines have not been substantially altered since they first became effective at all grade levels in 1964 (Brief, pp. 11-12) and that at the time they received judicial sanction, this Court had not yet announced the result-oriented standards of *Swann* and *Davis* v. *Board of School Comm'rs,* 402 U.S. 33 (1971) (Brief, p. 8). As we said in the Petition (at p. 12), it is hardly surprising, given the racial residential segregation existing when this suit was brought and continuing to this day (340 F. Supp., at 716; 12a), that "neighborhood school" zones have resulted in school segregation. See *Swann,* 402 U.S. at 28.

The 1971-72 enrollment figures, enumeration of which respondents label a "static presentation," (Brief, p. 4) were not represented as current (see Petition at p. 7). They were listed, however, to emphasize the gravity of the district court's error in characterizing the school system as "unitary." The Court of Appeals compounded the error by lifting out of context *Swann's* reference to a "small number" of racially identifiable schools, and applying it to Knoxville, which has never had a "large number" of black schools. The meaning of the phrase varies with the history and circumstances of each school district: even one

such school would have been unacceptable in New Kent County, Virginia.

It is undoubtedly true that in 1971, Knoxville at long last took "[*some*] affirmative action to improve the racial mix" in its schools. It finally paired schools whose combination had been recommended years ago by the University of Tennessee Title IV Center. See also, U.S. Comm'n on Civil Rights, *Racial Isolation in the Public Schools* 65 (1967). But the continued assignment of three-fifths of Knoxville's black students to heavily black schools is eloquent evidence of Knoxville's failure to take "all necessary steps" to eliminate racially identifiable schools, in satisfaction of its constitutional obligation.[1]

III

Certainly there is a place for proper fact-finding in this litigation. Petitioners have on the several appeals of this case presented to the Sixth Circuit flagrantly erroneous findings of the trial judge. We have never succeeded in having these reviewed, either because the Court of Appeals has simply remanded the case for reconsideration (as in 1964 and 1971) or because the questions are ignored (as in 1973). For example, the district court stated that transfer forms for Austin-East High School (see Appendix A) introduced into evidence could not support the testimony of plaintiffs' educational expert witness that the school system's transfer practices had perpetuated segregation (340 F. Supp., at 725-26; 21a-22a). Not only had the district court itself previously suggested as much (340 F. Supp., at 719; 15a) but Petitioners reproduced all of the transfer forms in the Appendix in the Court of Appeals, pointing out the abundant indications that white students

[1] Appendix A hereto provides a very brief summary of Knoxville's school desegregation history.

were permitted to transfer out of the paired high schools for racial reasons.[2]

In similar fashion, the district court criticized plaintiffs' educational expert for not using the board's pupil locator data in drafting his plan (340 F. Supp., at 721; 17a) even though the court itself found the data was inaccurate (340

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[2] We summarized the transfer forms in our Court of Appeals brief as follows:

> The forms are all from white students (see master listing at A. 1567-70). There are transfer requests from 51 students—some having repeatedly sought transfers—in the Austin-East zone. Not all of the students listed as having transferred at A. 1567-70 are represented in the transfer requests; their forms may have been lost.
>
> Of the 51 students, 20 of their latest requests were approved and 29 were denied; the other two students had submitted forms unnecessarily after changing their addresses and moving into another zone. Only six of the twenty-nine white students whose requests to transfer out of Austin-East were denied remained at the school: LaVerne Cox, Mary Green, Miriam Kenimer, Larry Patty, Alan Rogers, Eursal Payne. 8 whites whose transfer forms are marked "disapproved" are shown on the master listing as having obtained transfers and subsequently been graduated from Fulton, Holston or Rule. Among these, incredibly enough, is one Brenda Keeling (A. 1597-98); in the winter of 1967 Miss Keeling's request to transfer from East to Rule
>
> > Because of the colored. They are a colored boy that is causing trouble in a way which I don't improve of; causing talk [A. 1598]
>
> was denied. In the spring of 1968 another request to transfer, this time from East to Fulton because of the "racial situation" (A. 1597) was disapproved. Yet the school system reports (A. 1567) that Miss Keeling was a Holston graduate! Another example is Miss Becky Suffridge (A. 1634), who sought a transfer because she was "socially deprived." Although it was denied, she is listed (A. 1567) as a Fulton graduate.
>
> Some of the approvals are equally interesting. Two were granted because of racial complaints (Larry and Vicki Pickens, A. 1617-20). Five other transfer requests were granted despite previous disapprovals of the same or similar transfer pleas. For example, Eddie Parton first sought transfer

F. Supp., at 713; 9a) and the school board's expert also declined to use it for this reason (A. 413-14). These and other serious factual errors made by the district court were brought to the attention of the Court of Appeals but were never addressed by that Court.

To the extent that factual matters are made relevant in this case by the correction of the legal mistakes committed below, the Court of Appeals should have set aside numerous district court findings as being "clearly erroneous."

IV

The failure of the Court of Appeals to deal with the legal and factual issues presented by the district court's ruling in this case corresponds to that Court's refusal to fashion a consistent body of school desegregation law in accord with this Court's decisions and applicable throughout the Circuit.

We pointed out in the Petition (p. 12) that the decision below conflicts with other Sixth Circuit rulings approving or ordering extensive desegregation of school systems using pupil transportation. In this respect, it is similar to previ-

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in early 1968 on the ground that it was inconvenient for him to attend East (A. 1612); his request was denied. In late spring, 1968, he again sought to change schools because of "emotional difficulty in adjusting to a specific situation" (A. 1611) (a phrase which appears with annoying regularity on many transfer forms). That was denied, and in August, 1968 he filed another request to transfer to Fulton because he "wants to learn a trade" (A. 1610). This request was also denied, but a school official wrote on the form, the words "What Trade?" Finally, on September 4, 1968 Parton got the message, requested transfer so as to take "machine shop," which was not offered at Austin, and was granted his transfer (A. 1609). James Dockery was denied a vocational transfer in the summer of 1967, appealed to the school board and lost (A. 1588); yet the following winter he was granted a vocational transfer (A. 1587).

ous panel opinions which affirmed district court orders allowing the continuation of segregated schools on the basis of "district court discretion." *E.g., Robinson* v. *Shelby County Bd. of Educ.*, 467 F.2d 1187 (6th Cir. 1972). For years, such unresolved conflicts among panels of the Circuit concerning the necessity for substantial integration, what constituted "racial balance," etc., left district courts and litigants alike without any guidance except the latest utterance of a panel.[3]

We had hoped that these conflicts, which produced markedly different levels of desegregation in the public schools of Tennessee's major cities (see Petition, p. 12 n.19), would be resolved by the full Court in the first *en banc* considerations of school desegregation cases it had ever scheduled, in the *Mapp* and *Goss* cases. However, in each instance, the Court of Appeals merely affirmed the district court without analyzing the legal issues presented, dismissing any conflict with the "brief answer" that the proof was different in each case (4a). *Mapp* v. *Board of Educ.*, 477 F.2d 851 (6th Cir.), *cert. denied*, 42 U.S.L.W. 3290 (1973); *Goss* v. *Board of Educ.*, 482 F.2d 1044 (6th Cir. 1973). The uncertainty about the legal requirements continues throughout the Circuit.[4] We respectfully suggest that the Sixth Circuit's refusal to establish Circuit-wide standards to end the confusion created by its own decisions in this important

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[3] Thus, for example, the Chattanooga School Board claimed that after an initial ruling in its case based upon *Kelley* v. *Metropolitan County Bd. of Educ.*, 436 F.2d 856 (6th Cir. 1970) and *Robinson* v. *Shelby County Bd. of Educ.*, 442 F.2d 255 (6th Cir. 1971), "[t]he District Court appeared to shift emphasis on the basis of *Goss* v. *Board of Education of the City of Knoxville* [1971] . . ." Brief for Defendant-Appellee and Cross-Appellant, 6th Cir. No. 71-2006, -2007, p. 15.

[4] Indeed, the City of Chattanooga sought to support its request for review by this Court by pointing to the later *en banc* decision in *Goss*. Petition in No. 73-188, p. 12.

area of public law warrants the exercise of this court's supervisory review power. See Rule 19(1)(b) of this Court.

Symbolic of the conflict is the Court's *en banc* ruling in *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir.), *cert. granted*, 42 U.S.L.W. 3306 (1973). It is remarkable that the same Court which contemplated the exchange of pupils, presumably by bus, between Detroit and its suburbs, to effectuate desegregation, also affirmed the continuation of segregation in the much smaller Knoxville system. But this Court's decision in the *Bradley* case on the remedial issue there presented—whether the Court has the power to go beyond the district boundary line—will not settle the issues presented by this case, nor furnish the necessary guidance to other Sixth Circuit litigants in school desegregation actions. Wholly irrespective of the Court's determination in *Bradley*, this cause should be reviewed in order to enforce the commands of *Swann* and the Fourteenth Amendment in Knoxville and throughout the Sixth Circuit.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition for Writ of Certiorari, Petitioners respectfully pray that the Writ be granted.

Respectfully submitted,

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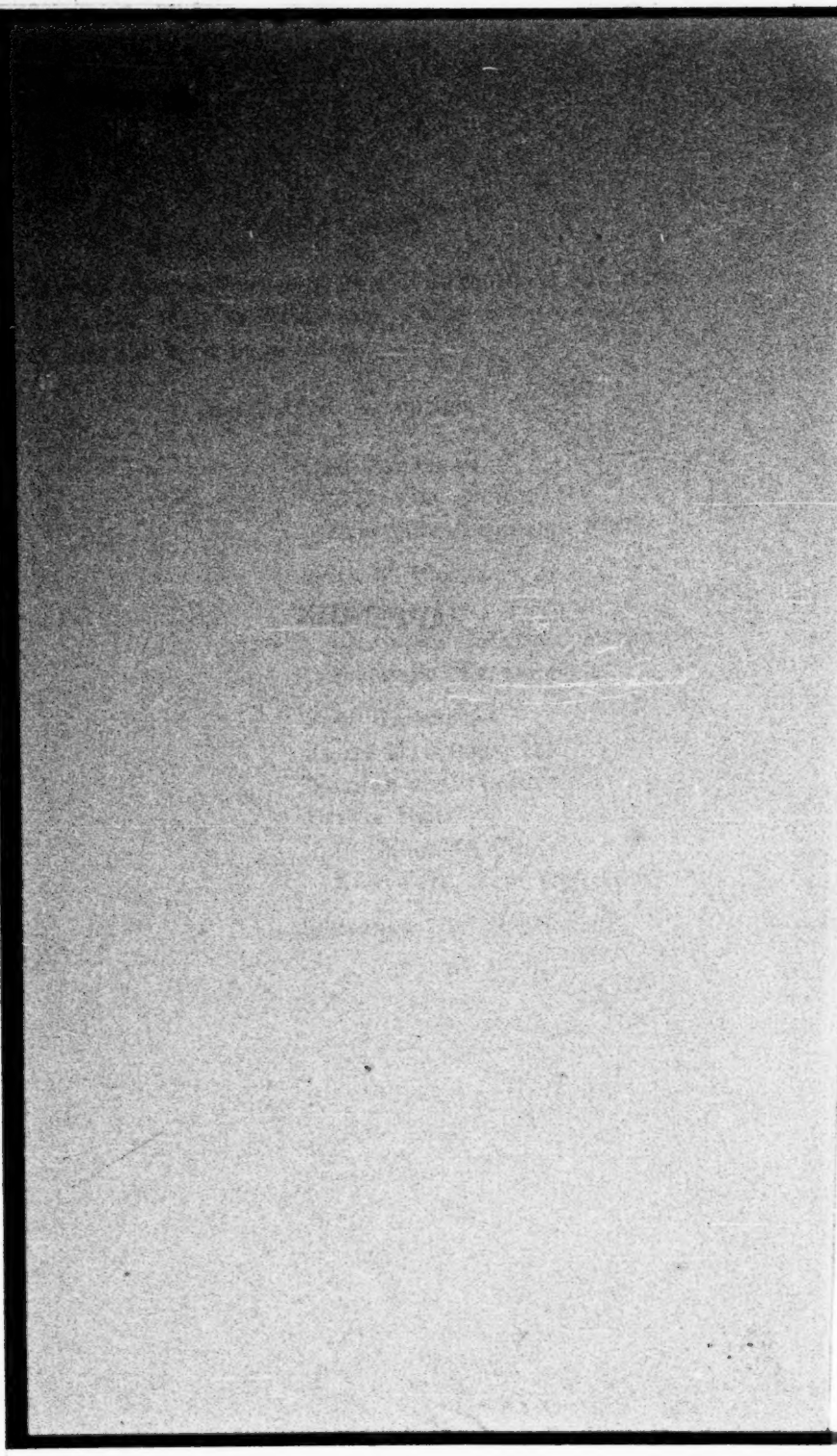
APPENDIX



APPENDIX A

History of School Desegregation in Knoxville

1957 First federal court desegregation action filed

1959 Case dismissed without prejudice on procedural grounds

1960 Present litigation instituted. Board submits grade-a-year plan with minority-to-majority transfer; approved by district court

1962 Initial assignments of students in several elementary grades based on single zone lines; dual zones are maintained for other grades. Court of Appeals approves minority-to-majority transfer

1963 Supreme Court disapproves transfer feature

1964 Plan covers elementary grades. Explicit minority-to-majority transfer discontinued but plan permits "grade requirement" (remain in school previously attended until graduation) and "brother-sister" (go to schools attended by other family members) transfers. Plaintiffs' appeal dismissed on representation of board attorney that "all discriminatory practices" would be eliminated by 1965

1965 Zones established for all grades. Broad transfer provisions continue in effect

1967 District court holds transfer provisions facially valid and finds no gerrymandering of zone lines. 68% of all black students assigned to 9 schools more than 95% black

1968 Board "pairs" formerly black Austin High and formerly white East High but permits transfers to

Fulton for vocational courses, etc. Few white students attend combined Austin-East High School

1969 Court of Appeals affirms district court, holding that attendance patterns without showing of gerrymandering do not establish constitutional violation in formerly dual school system, as in historically unitary system, citing *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967)

1970 In response to plaintiffs' *Alexander* [v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969)] motion, district court holds system "unitary," but criticizes board for failing to keep transfer records sufficient to explain non-attendance of white students at Austin-East complex (320 F. Supp., at 557) and to eliminate overcrowding and underutilization of adjacent predominantly white Rule High and predominantly black Beardsley Jr. High (320 F. Supp., at 556)

1971 Court of Appeals remands for reconsideration in light of *Swann*, recognizing that new standards require reassessment of past holdings and that *Swann* "forbids the use of our decisions in *Deal* . . . to justify a plan of desegregation in a state which employed *de jure* segregation until the *Brown* decision" (444 F.2d, at 639)

1972 After new round of hearings, district court again holds system was unitary despite maintenance of seven all-black schools since neighborhood school zones are reasonably drawn. Court allows board to implement school closings and pairings it proposed after *Swann* remand from Court of Appeals

1973 Court of Appeals affirms district court ruling. 59% of black students assigned to heavily black schools